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13  
14 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
15

16 UNITED STATES OF AMERICA, the )  
17 PEOPLE OF THE STATE OF )  
CALIFORNIA, *ex rel.* CALIFORNIA )  
18 AIR RESOURCES BOARD, and NORTH )  
COAST UNIFIED AIR QUALITY )  
19 MANAGEMENT DISTRICT, )

20 )  
21 Plaintiffs, )

22 v. )

23 EVERGREEN PULP, INC., )

24 Defendant. )  
25  
26  
27  
28

No. C 07-05067 SBA

PLAINTIFFS' MEMORANDUM IN  
SUPPORT OF REQUEST  
TO ENTER CONSENT DECREE

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1 The United States of America, on behalf of the United States Environmental Protection  
2 Agency (“EPA”), the California Air Resources Board (“ARB”) and the North Coast Unified Air  
3 Quality Management District (“North Coast” or “District”) (collectively, the “Plaintiffs”)  
4 brought an action pursuant to Section 113 of the Clean Air Act (the “CAA”), 42 U.S.C. § 7413,  
5 California Health and Safety Code § 42403, and North Coast Unified Air Quality Management  
6 District Rule 105 alleging that Defendant Evergreen Pulp, Inc. (“Defendant” or “Evergreen”)  
7 violated the CAA, California state law and District regulations at its kraft pulp mill in Samoa,  
8 Humboldt County, California (the “Facility”).

9 Simultaneously, on October 2, 2007, the Plaintiffs lodged a Consent Decree (“Evergreen  
10 Consent Decree”, “Consent Decree” or “Decree”) with the Court that would require Evergreen to  
11 implement certain injunctive relief and pay a civil penalty. Notice of Lodging of the Evergreen  
12 Consent Decree was published in the *Federal Register* and the Plaintiffs sought public comment  
13 on the proposed settlement. See 72 Fed. Reg. 58125 (Oct. 12, 2007).

14 During the thirty-day public comment period, the Plaintiffs received two sets of  
15 comments. Copies of the comments are attached as Exhibit A. After evaluating the comments  
16 as described below, the Plaintiffs have determined that the proposed Evergreen Consent Decree  
17 is fair, reasonable, and in the public interest and therefore request the Court to enter the Decree.  
18 Pursuant to Paragraph 72 of the proposed Evergreen Consent Decree, Evergreen consented to  
19 entry of the Decree without further notice.

## 20 **I. BACKGROUND**

21 This case concerns alleged violations of the CAA and state law at a kraft pulp mill owned  
22 and operated by Evergreen, and located in Samoa, Humboldt County, California. Specifically, it  
23 is alleged that the Facility violated particulate matter (“PM-10”) emissions limits applicable to  
24 the Facility’s smelt dissolving tank (“SDT”) and lime kiln. In addition, the Facility is alleged to  
25 have violated emissions standards, and monitoring, reporting and recordkeeping (“MRR”)  
26 requirements imposed by the maximum achievable control technology (“MACT”) requirements  
27 for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone  
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1 Semichemical Pulp Mills at 40 C.F.R. Part 63, Subpart MM, §§ 63.860-868. There were also  
2 alleged violations of Part 4 of Division 26 of the California Health and Safety Code and the  
3 Rules and Regulations of the North Coast Unified Air Quality Management District at the lime  
4 kiln and the SDT.

5 **II. THE EVERGREEN CONSENT DECREE**

6 As a part of the settlement of this matter, Evergreen installed an electrostatic precipitator  
7 (“ESP”) to control air pollutant emissions from the lime kiln, see Para. 16 of Cynthia Steiner’s  
8 Declaration (“Steiner Declaration”), attached as Exhibit B, and it made modifications to the  
9 pollution control device for the SDT. Steiner Declaration Para. 8. The Evergreen Consent  
10 Decree requires Evergreen to comply with additional injunctive requirements to assure the  
11 Facility’s compliance with the CAA and state law. Decree Paras. 10-23. Significantly, the  
12 Evergreen Consent Decree requires Evergreen to comply with emissions limits for PM-10,  
13 hazardous air pollutants, and opacity limits that are applicable to the SDT and the lime kiln.  
14 Decree Paras. 12 & 17. The Evergreen Consent Decree also requires Evergreen to comply with  
15 MRR requirements, including installation and operation of a continuous opacity monitor system  
16 on the lime kiln stack. Decree Para. 8 In addition, the Evergreen Consent Decree requires  
17 Evergreen to pay a civil penalty of \$900,000 (divided equally among the three Plaintiffs).  
18 Decree Paras. 7-9.

19 **III. THE COMMENTS AND PLAINTIFFS’ RESPONSES**

20 The Plaintiffs received two sets of comments. The first comment stated that the Facility  
21 has polluted the environment for a number of years, the District has not exercised sufficient  
22 oversight over the Facility, and questioned whether there were sufficient enforcement tools in the  
23 Decree to ensure that Evergreen installs the pollution controls it is required to install under this  
24 settlement. The second comment points out that emissions from the Facility have adversely  
25 impacted public health and quality of life in the community surrounding the Facility.

26 The Plaintiffs have responded to the comments through the declaration of Cynthia Steiner,  
27 an engineer with EPA, and Richard Martin, Jr., Executive Director, Air Pollution Control  
28

Officer, with the District. Ms. Steiner states that the pollution controls installed and/or operated under the proposed Decree properly address the violations of the CAA at the Facility, are ensuring that Evergreen is no longer in violation of the applicable regulatory requirements and are reducing emissions from the Facility. Mr. Martin reviews the actions that the District has taken to bring the Facility into compliance.

#### **IV. THE EVERGREEN CONSENT DECREE IS IN THE PUBLIC INTEREST**

The trial court should enter a consent decree if it is “‘reasonable, fair, and consistent with the purposes that [the statute] is intended to serve.” United States v. Montrose Chemical Corp. of California, 50 F.3d 741,747 (9th Cir. 1995) (citation omitted). Because the Evergreen Consent Decree meets this governing standard, the Plaintiffs request the Court to enter the Evergreen Consent Decree.

##### **A. Standard of Review for Approving a Consent Decree**

Approval of a proposed consent decree is committed to the informed discretion of the district court. United States v. State of Oregon, 913 F.2d 576, 580 (9th Cir. 1990); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984). The court’s discretion should be exercised in favor of the strong policy favoring voluntary settlement of litigation. Ahern v. Central Pacific Freight Lines, 846 F.2d 47, 48 (9th Cir. 1988). This policy has “‘particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.” United States v. Cannons Eng’g Corp., 899 F.2d 79, 84 (1st Cir. 1990); see also United States v. SEPTA, 235 F.3d 817, 822 (3d Cir. 2000) (judicial review of a settlement negotiated by the United States should be informed by the deference owed to “‘EPA’s expertise and to the law’s policy of encouraging settlement”). Accordingly, the Ninth Circuit has stated that “‘a district court reviewing a proposed consent decree ‘must refrain from second-guessing the Executive Branch.’” Montrose Chemical Corp., 50 F.3d at 746; see also United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (the balancing of interests “‘must be left, in the first instance, to the discretion of the Attorney General”).

In undertaking its review, a court is not required to make the same in-depth analysis of a

1 proposed settlement that it would be required to make in order to enter a judgment on the merits  
 2 after trial. “The trial court in approving a settlement need not inquire into the precise legal rights  
 3 of the parties nor reach and resolve the merits of the claims or controversy, but need only  
 4 determine that the settlement is fair, adequate, reasonable and appropriate under the particular  
 5 facts and that there has been valid consent by the concerned parties.” Citizens for a Better Env’t  
 6 v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983); accord, State of Oregon, 913 F.2d at 582.

7 A court does not have the authority to modify the decree. Instead, it must either accept or  
 8 reject the decree as submitted. See Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615,  
 9 630 (9th Cir. 1982). The relevant standard “is not whether the settlement is one which the court  
 10 itself might have fashioned, or considers as ideal, but whether the proposed decree is fair,  
 11 reasonable, and faithful to the objectives of the governing statute.” Cannons Eng’g Corp., 899  
 12 F.2d at 84.

#### 13 B. The Consent Decree is Fair

14 In assessing a proposed settlement, courts consider both procedural and substantive  
 15 fairness. Cannons Eng’g Corp., 899 F.2d at 86-88. In this case, the parties were represented by  
 16 independent counsel and negotiated for a substantial period of time before finally reaching a  
 17 settlement agreement. As the Ninth Circuit concluded in State of Oregon, 913 F.2d at 581, if a  
 18 settlement is the product of good faith, arm’s length negotiations, it is “presumptively valid and  
 19 the objecting party ‘has a heavy burden of demonstrating that the decree is unreasonable.’” The  
 20 settlement here is also substantively fair because it takes into account the public interest by  
 21 requiring the installation of control equipment that will limit the emissions of a number of air  
 22 pollutants. Steiner Declaration Para. 18. In addition, the settlement requires the payment of a  
 23 penalty that reflects the significance of the violations and that recoups any economic benefit  
 24 potentially gained by prior non-compliance at the Facility. Steiner Declaration Para. 23.

#### 25 C. The Consent Decree is Reasonable and Furthers the CAA’s Goals

26 In ascertaining whether a settlement is reasonable, a court considers factors such as the  
 27 nature and extent of the potential hazards, the availability and likelihood of alternatives to the  
 28

1 settlement, whether the settlement is technically adequate to accomplish the goal of cleaning up  
 2 the environment, and the extent to which the settlement furthers the statute's goals. United  
 3 States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1053 (N.D. Ind. 2001); see also  
 4 United States v. Seymour Recycling Corp., 554 F. Supp. 1334, 1339 (S.D. Ind. 1982). The  
 5 underlying purpose of the review is to determine whether the settlement adequately protects the  
 6 public interest. BP Exploration & Oil Co., 167 F. Supp. 2d. at 1049.

7 As part of the settlement in this case, Evergreen installed pollution control equipment on  
 8 the lime kiln and the SDT. Steiner Declaration Para. 8 and Para. 16. EPA estimates that this  
 9 settlement will have resulted in significant reductions of harmful air pollutants from the lime kiln  
 10 of approximately 240 tons per year. Steiner Declaration Para. 18.

11 If this case had been litigated, the Court would have needed to decide the technically  
 12 complex issues associated with the installation of pollution control equipment. Assuming that  
 13 the Court would have granted the Plaintiffs' request for relief, a potential appeal of the Court's  
 14 ruling would have potentially delayed implementation of the remedy even farther into the future.  
 15 In assessing this case, the Plaintiffs determined that the value of timely concrete results achieved  
 16 by the Evergreen Consent Decree clearly outweighed the value of possible future relief to be  
 17 ordered by this Court after protracted and expensive litigation. Jones v. Nuclear Pharmacy, Inc.,  
 18 741 F.2d 322, 324 (10th Cir. 1984); United States v. Chevron U.S.A., Inc., 380 F. Supp. 2d  
 19 1104, 1118 (N.D. Cal. 2005).

## 20 **V. PLAINTIFFS' RESPONSE TO COMMENTS ON THE EVERGREEN CONSENT** 21 **DECREE**

22 The public comments which are relevant to the allegations in the Complaint and the  
 23 Evergreen Consent Decree are summarized below, followed by the Plaintiffs' response to the  
 24 comments.

### 25 **Commenter 1 (Campbell)**

1 Comment 1: One commenter expressed a concern that the Facility has been allowed to operate  
2 “all these years spewing out emissions that violated the federal emission standard for hazardous  
3 air pollutants.”

4  
5 Response: The Facility has existed since 1965. For many years, the Facility was owned and  
6 operated by Louisiana Pacific, Inc. In February 2001, Louisiana Pacific sold the Facility to  
7 Samoa Pacific Cellulose, LLC. Samoa Pacific owned and operated the Facility until August  
8 2003, when ownership of the mill passed to Stockton Pacific Enterprise, LLC. Stockton Pacific  
9 Enterprise owned and operated the Facility until January 2005, when control was assumed by  
10 Evergreen Pulp, Inc. Evergreen is the current owner and operator, and the Defendant in this  
11 case. Steiner Declaration Para. 5.

12 The Decree primarily addresses alleged violations of Clean Air Act emissions  
13 requirements at two of the Facility’s emissions units: the SDT and the lime kiln. In the  
14 Complaint, Plaintiffs alleged that the Facility’s SDT exceeded a limit on particulate matter  
15 (“PM”) emissions of .2 pounds of PM per ton of Black Liquor Solids (“lb/ton BLS”). This limit  
16 is imposed through 3 separate regulatory programs: the New Source Performance Standards  
17 (“NSPS”); the Facility’s Title V Operating Permit; and the Maximum Achievable Control  
18 Technology (“MACT”) requirements. Steiner Declaration Para. 6. The time period of the  
19 alleged violations is from January 2005 (when the Defendant assumed ownership of the Facility)  
20 until September 15, 2005. Steiner Declaration Para. 7. In early September 2005, the Defendant  
21 installed and commenced operation of a “spray curtain” to improve the performance of the  
22 equipment used to reduce PM emissions from the SDT. Steiner Declaration Para. 8. Defendant  
23 conducted a source test on September 15, 2005, that demonstrated that the Facility was achieving  
24 compliance with the .2 lb/ton BLS limit. Steiner Declaration Para. 9. Except for a short period  
25 of time between November 21, 2005 and December 7, 2005, when the Facility experienced  
26 minor non-compliance likely associated with the updating of monitoring equipment, source  
27 testing at the Facility has indicated compliance with SDT PM limits. Steiner Declaration Para.  
28



1 11.

2 In the Complaint, the Plaintiffs also alleged that the Facility's lime kiln exceeded limits  
3 on PM emissions. One limit is imposed by the Facility's Title V Operating Permit, which  
4 restricts PM emissions to .2 grains per standard cubic foot or 1 pound per ton of production.  
5 Steiner Declaration Para. 12. A source test conducted in March 2005 indicated that the Facility  
6 was in compliance with this limit. Steiner Declaration Para. 13. The Facility conducted another  
7 test in August 2005, which indicated the Facility was not in compliance with this limit. Steiner  
8 Declaration Para. 13. Therefore, the Plaintiffs alleged violations of this limit from August 2005.  
9 Steiner Declaration Para. 13.

10 The lime kiln is also subject to a limit imposed by the federal MACT program, which  
11 restricts emissions of harmful air pollutants to .064 grains per dry standard cubic foot ("dscf").  
12 Steiner Declaration Para. 14. The MACT program became effective in March 2004, at which  
13 time the Facility was under a different ownership. Steiner Declaration Para. 5. In the  
14 Complaint, the Plaintiffs alleged that the Defendant violated this limit from the date the  
15 Defendant began pulp production in March 2005. As stated above with respect to the Facility's  
16 non-compliance with the PM limit in the Facility's Title V permit, the Plaintiffs believe the  
17 Defendant's installation and operation of an ESP has brought the Defendant into compliance  
18 with the MACT emission standard. Steiner Declaration Para. 17.

19  
20 Comment 2: The commenter expressed concern about the level of oversight of the Facility by the  
21 North Coast Unified Air Quality Management District.

22  
23 Response: The District has been actively involved in oversight of the Facility as identified  
24 below. This oversight is continuous for this Facility and includes many different forms of  
25 compliance determinations. See Para. 6 of Richard Martin Jr.'s Declaration ("Martin  
26 Declaration"), attached as Exhibit C. District-issued permits require the Facility to monitor  
27 and/or test emissions from its different emissions producing units with regular frequency (for  
28

1 some equipment, continuous monitoring is required; for other equipment, quarterly reporting  
2 and/or annual testing is required). The District actively reviews these monitoring reports and  
3 will initiate enforcement as appropriate. Additionally, because the Evergreen pulp mill is a Title  
4 V source, the District conducts full compliance evaluations during regular inspections of the  
5 Facility at least annually. Martin Declaration Para. 5.

6 Enforcement activity by the District, initiated in April 2005, resulted in the District  
7 Hearing Board issuing an order to Evergreen to install a spray curtain on the SDT to control  
8 excess PM emissions. Martin Declaration Para. 8. In November 2005, the District Hearing  
9 Board issued an order to Evergreen requiring it to prepare and submit CAM (Compliance  
10 Assurance Monitoring) Plans for the lime kiln and SDT. Martin Declaration, Para. 9. In January  
11 2006, the District Hearing Board issued an Abatement Order requiring Evergreen to install an  
12 ESP on the lime kiln. Martin Declaration, Para. 10. This Abatement Order also required the  
13 immediate installation of an interim control measure on the lime kiln, a quench system, to reduce  
14 excess PM emissions. Id. Continued operation of the spray curtain pretreatment system for the  
15 SDT and of the interim quench system and ESP installation/operation requirements are all  
16 components of injunctive relief in the Decree.

17 The proposed Decree would settle 11 Notices of Noncompliance issued by the District to  
18 Evergreen for violations of local, state and federal air quality rules and regulations. Martin  
19 Declaration Para. 11. Most of these violations concern PM emissions from the SDT and lime  
20 kiln discovered during regular compliance testing. Id. Equipment maintenance violations were  
21 discovered during inspections. Martin Declaration Para. 12. Excess opacity violations were  
22 discovered through review of Continuous Emissions Monitoring (CEM) data. Martin  
23 Declaration, Para. 13. Finally, nuisance-type violations, generally excess odor, were discovered  
24 by District follow-up investigations of public complaints. Martin Declaration Para. 14.

25  
26 Comment 3: The commenter asked whether there can be any certainty that the Defendant “will  
27 install all of the equipment required to guarantee that the hazardous air pollutants will no longer  
28

1 be coming out of their smoke stacks” and whether Defendant will continue to just pay fines  
 2 rather than install “the expensive equipment that is required to stop the toxic emissions.”

3  
 4 Response: EPA estimates that Defendant has already spent approximately \$4 million on control  
 5 equipment to comply with applicable emission standards. Steiner Declaration Para. 22. In  
 6 September 2005, Defendant addressed non-compliance related to excess emissions at the SDT by  
 7 installing a spray curtain pretreatment system for the existing controls, which returned the SDT  
 8 to compliance with applicable emissions standards. Steiner Declaration Paras. 8 - 11. In April  
 9 2007, Defendant addressed non-compliance related to excess emissions at the lime kiln by  
 10 installing an ESP on the lime kiln emission stack. Steiner Declaration Para. 16. The Plaintiffs  
 11 will continue to oversee Defendant’s compliance with emissions standards by reviewing  
 12 Defendant’s monitoring and operational records. Moreover, the Consent Decree contains  
 13 stipulated penalties for violations of the Decree, Decree Paras. 29-32, and the obligations the  
 14 Decree imposes upon Evergreen are enforceable through the Court should there be questions  
 15 about whether Evergreen had done all that it is required to do under the Decree.

16 It should be noted that the Evergreen Consent Decree does not require Defendant to “stop  
 17 toxic emissions.” Plaintiffs estimate, however, that implementation of the Decree through the  
 18 operation of the spray curtain and ESP will reduce the Facility’s emissions of harmful air  
 19 pollutants by approximately 340 tons per year. Steiner Declaration Paras. 10 & 18. Based on  
 20 source test information, EPA estimates that there has been a reduction of approximately 98% in  
 21 the emission of harmful air pollutants from the lime kiln compared to the lime kiln’s emissions  
 22 before installation of the ESP. Steiner Declaration Para. 18. There is no statutory, regulatory, or  
 23 evidentiary basis to require the Defendant to cease all emissions of hazardous air pollutants.

24  
 25 **Commenter 2 (“Halonet”)**

26  
 27 Comment 1: The commenter expresses concern that the air emissions from the Facility are  
 28

1 affecting the quality of life of the people living in Eureka.

2  
3 Response: Pulp mills such as the Facility characteristically use chemical processes to turn wood  
4 chips and sawdust into wood pulp. Martin Declaration Para. 7. These processes result in the  
5 emission of sulfurous odors known as total reduced sulfur, or TRS, compounds, which are  
6 controlled and regulated through permit conditions. Id. However, the release of TRS can create  
7 an annoyance or nuisance to members of the public. Id. These odors are likely at the basis of  
8 the commenter's concern. Part of the penalty required by this consent decree relates to  
9 Defendant's violation of state nuisance requirements. Martin Declaration Para. 11. District staff  
10 will continue in the future to investigate public complaints as they come in and take enforcement  
11 action as appropriate. Martin Declaration Para. 7. In addition, in early September 2005,  
12 Evergreen installed and commenced operation of a spray curtain before the wet scrubber to  
13 reduce SDT PM emissions. Steiner Declaration, Para. 8. EPA believes that, if properly  
14 maintained and operated, the spray curtain may help reduce TRS emissions. Id.

15  
16 Comment 2: The commenter expresses concern that the air emissions from the Facility are  
17 affecting the health of the people living in Eureka.

18  
19 Response: This Decree requires Defendant to install, operate and maintain equipment to reduce  
20 emissions of particulate matter and hazardous air pollutants. The Plaintiffs anticipate that the  
21 equipment required by this consent decree will reduce Defendant's emissions of harmful air  
22 pollutants by 340 tons per year. Steiner Declaration Paras. 10 & 18.

23  
24 Comment 3: The commenter stated that the fines in this settlement are insufficient; that the  
25 penalty should be \$100 million a day for every day the Facility is out of compliance; and that the  
26 Facility "needs to be closed finally and permanently and then torn down.

Response: Under the terms of the Evergreen Consent Decree, Evergreen agrees to pay a civil penalty of \$900,000. This settlement amount is consistent with EPA's Clean Air Act Stationary Source Civil Penalty Policy, dated October 25, 1991. Steiner Declaration Para. 23. In addition, the Decree specifies that Evergreen must pay the civil penalty in equal shares to the three governmental entities that actively pursued the alleged violations in this case. The penalty-sharing aspect of the case is consistent with EPA guidance entitled, "Joint Collection of Penalties with State and Local Governments and Federally Recognized Indian Tribes," dated March 11, 2005, signed by Thomas V. Skinner, Acting Administrator ("Joint Collection of Penalties Memo"). Steiner Declaration Para. 24. There is no statutory, regulatory, or evidentiary basis to require the Defendant to cease operation of the Facility. The Consent Decree properly carries out the mandate of the CAA by requiring pollution controls that will bring Evergreen into compliance with the existing regulatory requirements.

# **VI. CONCLUSION**

The Evergreen Consent Decree, and the remedy it requires, is fair, reasonable and in the public interest. Moreover, as demonstrated by Plaintiffs' response to the public comments, none of the comments provides any basis for rejecting the Evergreen Consent Decree. The Plaintiffs therefore request the Court to enter the Evergreen Consent Decree.

Respectfully submitted,

For the United States of America:

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18 Attestation Regarding Signature: This document is being filed electronically under my  
19 User ID and Password. Pursuant to General Order 45, Section X.B, I hereby attest that  
20 concurrence in this filing of this document has been obtained from each of the other signatories  
21 to this document.  
22  
23

24 /s/ Ann C. Hurley  
25 Ann C. Hurley  
26  
27  
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